

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**



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P/S

# 74-1578

*To be submitted*

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1578

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UNITED STATES OF AMERICA,

*Appellee,*

—v.—

PETER PHILLIP MAUCLIN,

*Defendant-Appellant.*

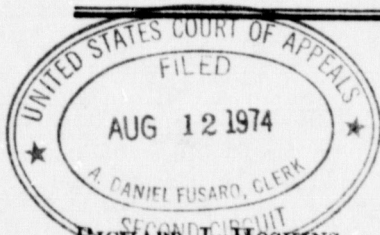
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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### BRIEF FOR THE UNITED STATES OF AMERICA

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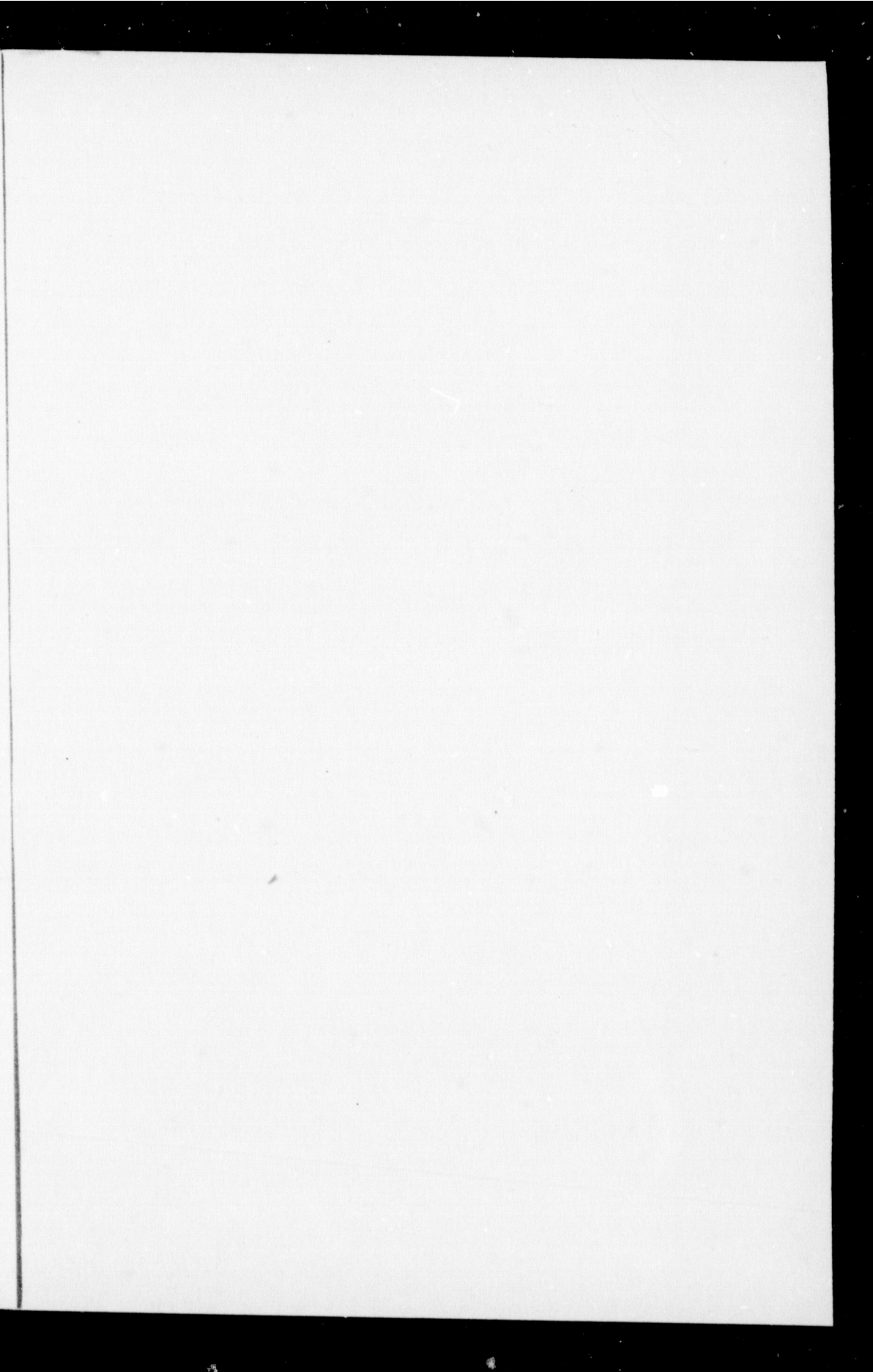
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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**Preliminary Statement**

Peter Phillip Mauchlin appeals from a judgment of conviction entered on April 26, 1974, in the United States District Court for the Southern District of New York, after a five-day trial before the Honorable Harold R. Tyler, United States District Judge, and a jury.

Indictment 73 Cr. 1046, filed November 16, 1973, charged Peter Phillip Mauchlin in eleven counts with four armed bank robberies in violation of Title 18, United States Code, Sections 2113(a) and (d), as follows:

1, 6	Aug. 15, 1973	Franklin National Bank	\$ 9,540
		15 Columbus Circle	
		New York, N.Y.	
2, 7	Aug. 24, 1973	Franklin National Bank	12,562
		15 Columbus Circle	
		New York, N.Y.	

3, 8	Sept. 6, 1973	Franklin National Bank 433 Broadway New York, N.Y.	5,840
4, 9	Sept. 19, 1973	First Federal Savings & Loan Association 749 Madison Ave., New York, N.Y.	2,973

The indictment further charged Mauchlin in three counts with exploding a pipe bomb inside the Central Savings Bank, 145 Fourth Avenue, Manhattan, injuring nine persons, in violation of Title 18, United States Code, Sections 2113(a) and (d) (Counts 5 and 10) and Section 844(i) (Count 11).

Trial commenced on February 6, 1974 and concluded on February 14, 1974 with a verdict of guilty as to each of the eleven counts.

On April 26, 1974 Mauchlin was sentenced by Judge Tyler to a total of thirty years' imprisonment to be served consecutively to a fifteen-year term of imprisonment previously imposed by the United States District Court for the District of New Jersey for a 1971 bank robbery.

Mauchlin is presently serving the New Jersey sentence.



## Statement of Facts

### The Government's Case

#### A. The Bank Robberies.

##### 1. Franklin National Bank, August 15, 1973.

On August 15, 1973, Mauchlin, undisguised and armed with a pistol, entered the Franklin National Bank "satellite branch" at 15 Columbus Circle, Manhattan, and after threatening the bank's tellers, obtained approximately \$9,540 in currency, including a number of pre-recorded bills ("bait money"). Two of the tellers identified Mauchlin unequivocally as the perpetrator of that robbery. In addition, the Government offered bank surveillance photographs showing Mauchlin committing the robbery, bait money from the bank which was later seized from Mauchlin's apartment, and clothing and shoes worn by Mauchlin as well as a bag carried by him in the robbery, also found in his apartment, all identified by the witness (T. 119-27; 150-60, 177-80, 186-89, 331-36, 404-07, 414-18).<sup>\*</sup> After his arrest in November, 1973, Mauchlin admitted this bank robbery and the three others discussed *infra*. (T. 396-419).

##### 2. Franklin National Bank, August 24, 1973.

Nine days later, Mauchlin re-entered the same branch of the Franklin National Bank and, once again armed and undisguised, robbed the bank of \$12,562, including a number of pre-recorded bills. Three tellers, including two who had witnessed the previous robbery, unequivocally identified Mauchlin, and bank surveillance photographs depicted him committing the robbery. Moreover, the Government offered bait money from this robbery, seized from his apartment, together with articles of clothing from his apartment which appeared in the surveillance photographs. (T. 127-33, 150-60, 180-82, 193-94, 205-07, 211-19, 229, 414-18).

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<sup>\*</sup> "T." refers to the transcript of the trial and evidentiary hearing.

### **3. Franklin National Bank, September 6, 1973.**

On September 6, 1973, using a *modus operandi* identical to the two robberies described above, Mauchlin robbed the Franklin National Bank branch at 433 Broadway, Manhattan. Once again, two tellers unequivocally identified Mauchlin, and bank surveillance photographs depicted Mauchlin during the robbery (T. 229-38, 248-57, 331-76, 404-07).

### **4. First Federal Savings and Loan Association, September 19, 1973.**

Shortly after noon on September 19, 1973, Mauchlin was observed approaching for a third time the "satellite branch" of the Franklin National Bank at 15 Columbus Circle, Manhattan. Apparently, because of a number of workmen outside the bank, Mauchlin abruptly turned away from the bank and walked uptown on Central Park West (T. 216-19). Approximately one-half hour later, Mauchlin entered the First Federal Savings and Loan Association at 749 Madison Avenue, Manhattan, and, again armed and undisguised, robbed that bank of \$2,973. Although surveillance cameras were not operating at the time, two tellers unequivocally identified Mauchlin as the robber (T. 292-300, 308-10, 315-19, 331-36, 404-07).

### **B. The Bombing of the Central Savings Bank, October 13, 1973.**

At shortly after one p.m. on October 18, 1973, Mauchlin entered the Central Savings Bank at 14th Street and 4th Avenue in Manhattan carrying two black attache cases. One case, containing two live pipe bombs attached to a complex radio-controlled detonating device, was placed by Mauchlin close to a teller's counter; the second case, empty, was left near the entrance to the bank. As Mauchlin started to leave the premises, the bombs exploded prematurely, causing injury to at least nine persons and substantial

damage to the premises of the bank (T. 341-54, 357-67, 368-70, 374-82).

In a post-arrest confession to the bank-bombing, Mauchlin described in meticulous detail the extortion scheme which resulted in the bombing. He stated that he had intended to leave the bombs and the empty attache case in the bank and, carrying a radio transmitter which could detonate the pipe bombs, leave the bank, telephone the manager and, threatening to detonate the bombs by remote control, demand that the manager fill the empty case with money and bring it to a location outside the bank. Before the call could be made, however, one of the pipe bombs exploded and Mauchlin fled. (T. 462-67).

In addition to Mauchlin's confession, the Government offered in evidence numerous pipe fragments and other particles recovered from the bank, electronic components and other remnants of the exploded bomb, and a second bomb which, though detonated, did not explode. Through expert testimony, these items were matched as identical to electronic components and bomb-making materials seized from Mauchlin's apartment. (T. 331-36, 357-67, 374-82, 404-13, 481-89, 499-503). Finally, the Government introduced the business records of an ammunition store in Lodi, New Jersey which reflected that shortly before the date of the bombing the appellant, using his own name, had purchased the smokeless powder used to make the bombs. (T. 336-40).

### **The Defense Case**

Mauchlin offered no evidence.

## ARGUMENT

### I.

**The trial court was correct in holding, after a full evidentiary hearing, that Mauchlin's post-arrest statements were admissible.**

On the evening of November 6, 1973, Mauchlin was arrested by agents of the Federal Bureau of Investigation at 200 East 36th Street in Manhattan and immediately advised of the identity of the agents, his constitutional rights, and that he was being arrested for bank robbery.\* He was then taken to FBI headquarters where he was again advised of his rights and interviewed by Special Agent Quinn and two other FBI agents. At the beginning of the interview Mauchlin was shown bank surveillance photographs from the robberies of August 15 and 24 and September 6, and asked whether he wanted to comment on those robberies. He looked at the photographs and said, "Why do you want to know that? You already have my picture." (T. 15-21)

Special Agent Quinn then asked him how much money was left from the robberies and Mauchlin said that he had approximately \$20,000 in cash and travelers checks. Quinn mentioned to Mauchlin that if any of that money were being held by his sister or mother or if they had harbored him while he was a fugitive,\*\* those facts would be brought to the attention of the United States Attorney who would decide whether to prosecute. Later during the interview

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\* At the time of his arrest, Mauchlin was not suspected of any involvement whatsoever in the Central Savings Bank bombing (T. 23, 401, 438).

\*\* Mauchlin had escaped from Federal custody in February of 1973 following an earlier bank robbery conviction (T. 24-25).



Mauchlin said that he had information concerning the Central Savings Bank bombing of October 18, but that he would provide that information only if he received assurances that his mother and sister would not be prosecuted. The agents told Mauchlin that those assurances could come only from the United States Attorney and that he should bring it up with him. (T. 22-25)

The following day, Mauchlin was brought to the United States Courthouse where he was again advised of his constitutional rights by Assistant United States Attorney Henry Putzel, III. At that time, he identified himself in the bank surveillance photographs and admitted robbing all four banks. (T. 401-03)

Mauchlin also mentioned that he had information concerning the bombing of the Central Savings Bank on October 18, 1973, but that he would not discuss that information unless he had a written, notarized promise that his mother and sister would not be prosecuted for harboring a fugitive or for related crimes. Mr. Putzel wrote out such an agreement, signed and notarized it, and had Mauchlin read and sign it. At that point, Mr. Putzel again advised Mauchlin of his right not to make any statement. (T. 26-35)

Mauchlin then admitted that he had bombed the Central Savings Bank on October 18. As noted earlier (Section B., *supra*), his confession contained a full account of the extortion scheme which he had planned and a detailed description of the pipe bomb, remote control mechanisms, and electronic components which he used to carry out the scheme. (T. 462-67)

Mauchlin concedes that the FBI agents and the Assistant United States Attorney who questioned him advised him fully of his constitutional rights. Nonetheless, he urges that his admissions should have been suppressed be-

cause (1) the authorities made threats with respect to the arrest of his mother and sister; (2) he was physically ill at the time of arrest; and (3) he was not allowed to contact his attorney during questioning in the U.S. Attorney's Office. All these allegations are flatly refuted by the record and were properly rejected by Judge Tyler after an extensive pre-trial hearing. (T. 15-105)

Special Agent Quinn testified that upon Mauchlin's admission that he still retained about \$20,000 from the bank robberies, Quinn told him that if any of this money were in the hands of his mother or sister they might be subject to prosecution. (T. 21, 25, 28-34, 51-60, 63-69) Referring to this statement to Mauchlin, Judge Tyler found:

"However, I do not jump to the conclusion that the defense does, that this was coercion of the most obvious and crude order.

"I find, on the other hand, it was merely a simple statement of what might be the fact and an effort by the agents to generally inquire to see whether or not the defendant would be willing to admit whether it was any family member or, if not, somebody else" (T. 100).

Quinn testified that Mauchlin also expressed concern about the possibility that his mother and sister could be prosecuted for harboring a fugitive and that before he would give his information about the bombing of the Central Savings Bank—a crime of which he was not suspected—Mauchlin asked for and received from Assistant United States Attorney Putzel a written, notarized promise that they would not be prosecuted in return for his giving truthful information as to that incident. (T. 26-35) As to the promise, Judge Tyler said:

"I do not accept the argument that there is anything wrong with the defendant trying to do this. I do not think also that there is any rule in the law and

life that some defendant who has been arrested, who offers a proposition like this, is guilty of some conduct which would show that he was not in his right sense. In fact, I think it is a very sensible, human thing to want to have in mind." (T. 101)

Judge Tyler was clearly correct in finding Mauchlin's admissions wholly voluntary. In *United States v. Johnson*, 495 F.2d 378, 382-83 (4th Cir. 1974), the defendant, in jail on bank robbery charges, attempted, with the help of his wife, to escape by using the name of another prisoner. The scheme failed and the defendant, during questioning by agents, said that if his wife were not prosecuted for the attempted escape he would "lay it all out about the bank robbery." The agent promised that he would inform the United States Attorney of the defendant's cooperation, and the defendant then made a full confession of the robbery. No charges were filed against the wife. The Court of Appeals upheld the trial court's finding that defendant's confession was voluntarily made, despite his concern for his wife. Similarly, in *United States v. Pomares*, Dkt. No. 74-1219 (2d Cir. July 5, 1974), this Court held that the defendant's confession was not involuntary notwithstanding statements by agents that he faced heavy penalties for his criminal activities, that he was his own best lawyer, and that the wisest course of action would be to cooperate with the authorities rather than to exercise his right to remain silent. In an observation particularly relevant to this case, the Court noted that the agents simply "stated facts; they made no misrepresentations." *Id.*, slip op. at 4720. See also *United States v. McShane*, 462 F.2d 5, 6-8 (9th Cir. 1972); *United States v. Springer*, 460 F.2d 1344, 1347 (7th Cir. 1972); *United States v. Frazier*, 434 F.2d 994, 995-96 (5th Cir. 1970); *United States v. Ferrara*, 377 F.2d 16, 17-18 (2d Cir.), cert. denied, 389 U.S. 908 (1967); *United States v. Reese*, 351 F. Supp. 719, 720-21 (W.D. Pa. 1972).

Mauchlin has even less basis for his claim that his statements were inadmissible because he was physically ill at the time that he was arrested. Special Agent Quinn, who was present at the arrest and throughout the evening thereafter, testified that Mauchlin's demeanor was perfectly normal and that he showed no sign of illness or intoxication. (T. 19-20, 49, 64) Judge Tyler wholly rejected Mauchlin's testimony to the contrary and believed Quinn:

"I accept the testimony of Quinn that there was no objective or subjective evidence of any involvement with drugs, including mescaline, when the defendant was arrested during the evening of November 6th.

"Indeed, I think it is probably correct, as Mr. Quinn testified, that the defendant was relatively calm and that he was reasonably clear spoken, given his background and education and so forth. There was no evidence of abuse of drugs or alcohol." (T. 99)

*See United States v. Poole*, 495 F.2d 115, 118-22 (D.C. Cir. 1974). More important, however, is that Mauchlin's confessions as to both the bank robberies and the bank bombing occurred almost entirely in the United States Attorney's Office the day after his arrest, and even Mauchlin testified that at that time he knew what he was doing and what was happening, although he said that he felt "a little raw." (T. 90)

Mauchlin's final contention, that he requested and was refused the assistance of counsel, is based on a simple misreading of the testimony. The very testimony he cites in connection with his "request" for counsel (T. 70, lines 1-25) demonstrates that the "request" occurred at arraignment before the Magistrate, not during questioning by the Assistant U.S. Attorney, and was not a request for an attorney but simply a reply to the Magistrate's inquiry as to whether he had an attorney or would need to have one



appointed. The testimony of those present during the interview by Assistant United States Attorney Putzel was unequivocal that Mauchlin was repeatedly warned of his right to an attorney and that he repeatedly stated that he did not want one:

"Q. Special Agent Fox, during the interview of Mr. Mauchlin, do you recollect whether he was offered an opportunity to have an attorney present during that interview? A. Yes, he was.

"Q. On how many different occasions was he offered that opportunity? A. I can't say exactly. I do recall that during the time he was furnishing this information, that you [Mr. Putzel] asked him on a number of occasions whether he wanted an attorney, and again advised him that he did not have to furnish this information. I don't know the exact number of times. I'd say two or three, four times.

"Q. What was his response to that? A. He said that he didn't want an attorney at that time and that he knew he didn't have to give the statement." (T. 477)

(See also, T. 36-37, 69-71)

## II.

**The trial court was correct in holding, after full evidentiary hearings, that the in-court identifications of two witnesses were admissible.**

As noted earlier, seven eyewitnesses to the four bank robberies identified Mauchlin at the trial. Mauchlin urges that the in-court identifications made by two of those witnesses, Hagan and Emmermann, employees of the First Federal Savings & Loan Association and witnesses to the robbery of September 19, 1973, were tainted and should have been suppressed.

Within hours after their bank was robbed, these witnesses identified bank surveillance photographs of Mauchlin taken during the robbery less than two weeks earlier of the Franklin National Bank branch at 433 Broadway. Miss Hagan identified Mauchlin from a display of between two and six photographs of white males while Miss Emmermann was shown only Mauchlin's picture. (T. 261, 267, 282)

At a hearing outside the presence of the jury, Miss Hagan testified that she had ample time to observe the person who robbed her, that she was standing only a few feet from him in a well-lighted bank in the daytime, that there were no obstructions between her and the robber, and she testified unequivocally that the photographs shown to her by the FBI—on the same day that the robbery occurred—had no influence whatsoever on her recollection of the robber or her present ability to identify Mauchlin as the robber. (T. 259-66) Similarly, Miss Emmermann testified that she had ample opportunity to observe the robber from close range, nothing obstructed her view, and looking at Mauchlin's photograph a half hour to an hour after the robbery did not affect her present ability to remember and identify Mauchlin as the man she observed during the holdup. (T. 280-87) After a carefully articulated evaluation of all the testimony, Judge Tyler found that even if the photographic displays were suggestive, there was no substantial likelihood of irreparable misidentification by these witnesses in view of the circumstances of their observation of the robber, the very short lapse of time between the robbery and the photographic identification, and the certainty of both witnesses that the photographic identifications did not influence their recollection and identification of Mauchlin as the robber. (T. 276-80, 289-91)

On appeal, Judge Tyler's determination is entitled to "great weight". *United States ex rel. Phipps v. Follette*,

428 F.2d 912, 915 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). Moreover, his ruling was clearly correct. *United States v. Yanishefsky*, Dkt. No. 74-1117 (2d Cir. July 30, 1974); *United States ex rel. Gonzalez v. Zelker*, 477 F.2d 797 (2d Cir. 1973); *United States ex rel. Curtis v. Warden*, 463 F.2d 84, 85, 88 (2d Cir. 1972); *United States ex rel. Frasier v. Henderson*, 464 F.2d 260, 264-65 (2d Cir. 1972); *United States ex rel. Beyer v. Mancusi*, 436 F.2d 755 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971); *United States v. Cox*, 428 F.2d 683 (7th Cir.), *cert. denied*, 400 U.S. 881 (1970). In *Simmons v. United States*, 390 U.S. 377, 384 (1968), the Supreme Court held:

"[E]ach case must be considered on its own facts, and . . . convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification."

Subsequent cases in this Circuit have held that the in-court identification must be suppressed only if it is found *both*: (1) that the photographic display was impermissibly suggestive, and (2) that as a result of that display there is a substantial likelihood of misidentification. *Haberstroh v. Montanye*, 493 F.2d 483 (2d Cir. 1974); *United States v. Evans*, 484 F.2d 1178 (2d Cir. 1973); *United States v. Fernandez*, 456 F.2d 638 (2d Cir. 1972); *United States ex rel. Gonzalez v. Zelker*, *supra*; *United States ex rel. Phipps v. Follette*, *supra*. See also *Neil v. Biggers*, 409 U.S. 188 (1972).

The hearing testimony fully supports Judge Tyler's conclusion that the in-court identification by these two witnesses were not influenced by any suggestiveness in photographic displays. First, both witnesses had an excellent

opportunity to observe the robber, standing only a few feet away in a well-lighted bank with no obstructions to hinder the close-range view. *Neil v. Biggers, supra*; *United States ex rel. Gonzalez v. Zelker, supra*; *United States ex rel. Smiley v. LaVallee*, 473 F. 2d 682 (2d Cir. 1973); *United States v. Counts*, 471 F.2d 422, 424-25 (2d Cir. 1973); *United States ex rel. Bisordi v. La Vallee*, 461 F.2d 1020, 1024 (2d Cir. 1972); *United States v. Fernandez, supra*, at 642; *United States ex rel. Cummings v. Zelker*, 455 F.2d 714 (2d Cir.), *cert. denied*, 406 U.S. 927 (1972); *United States ex rel. Phipps v. Follette, supra*; *United States ex rel. Rutherford v. Deegan*, 406 F.2d 217, 219-20 (2d Cir.), *cert. denied*, 395 U.S. 983 (1969). In addition, the photographs were shown to both witnesses within approximately an hour or less of the robbery. *United States v. Counts, supra*; *United States ex rel. Bisordi v. LaVallee, supra*; *United States v. Fernandez, supra*; *United States ex rel. Phipps v. Follette, supra*. Furthermore, both witnesses were unequivocal in stating that their in-court identifications were based on their recollection of the robber and not on photographs they had viewed. *Haberstroh v. Montanye, supra*; *United States ex rel. Smiley v. LaValle, supra*; *United States ex rel. Bisordi v. LaVallee, supra*. Finally, since Mauchlin admitted that he robbed the First Federal Savings & Loan Association on September 19, 1973, it can hardly be suggested that in fact a misidentification occurred. *Haberstroh v. Montanye, supra*; *United States ex rel. Cummings v. Zelker, supra*; *United States v. Abbate*, 451 F.2d 990 (2d Cir. 1971); *United States v. Roth*, 430 F.2d 1137, 1140 (2d Cir. 1970), *cert. denied*, 400 U.S. 1021 (1971); *United States ex rel. Phipps v. Follette, supra*.



**CONCLUSION**

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK )  
                              ) ss.:  
COUNTY OF NEW YORK)

JOHN D. GORDAN III being duly sworn,  
deposes and says that he is employed in the office of  
the United States Attorney for the Southern District  
of New York.

That on the 12th day of August, 1974  
he served 2 copies of the within brief by placing the  
same in a properly postpaid franked envelope addressed:

CHARLES DE FAZIO III  
922 Washington Street  
Hoboken, New Jersey 07030

And deponent further says that he sealed the said en-  
velope and placed the same in the mail drop for mailing  
at the United States Courthouse, Foley Square, Borough  
of Manhattan, City of New York.

Sworn to before me this

12th day of August, 1974

*John D. Gordan III* 14

*Gloria Calabrese*  
GLORIA CALABRESE  
Notary Public, State of New York  
No. 24-0535340  
Qualified in Kings County  
Commission Expires March 30, 1975